No. 16244

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ERIC O. SONNTAG,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Rules



### Statutes

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## APPELLEE'S BRIEF.

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### Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of all counts of an eleven-count indictment charging him with mail fraud in violation of Title 18, U. S. C., Section 1341 [T. 2, *et seq.*].[1] Said indictment charges, in substance, that prior to January 26, 1955, and continuing to February 19, 1958, the appellant devised, and intended to devise, a scheme and artifice to defraud persons who desired to purchase pets, and persons who operated shops selling pets, by means of certain alleged fraudulent pretenses, representations, and promises, which appellant knew to be false when made; and that for the

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[1]The abbreviation "T." refers to the Clerk's "Transcript of Record."

purpose of executing said scheme and artifice, appellant caused the United States mails to be used.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

The jurisdiction of the District Court was based upon Title 18, U. S. C., Section 3231. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Title 28, U. S. C., Sections 1291 and 1294.

## Statement of the Case.

At all times pertinent herein, appellant operated a pet shop in the City of Los Angeles, State of California, where pets and animals were sold on a retail and wholesale basis [R. 362-363].[2] As an adjunct to said business, appellant also undertook to solicit orders, through the mails, from other pet shops and the general public at large throughout the United States. This solicitation was accomplished by placing advertisements in such nationally circulated magazines as "All Pets" and "Popular Mechanics", and by mailing printed price lists, in brochure and post card form, to individual prospective customers [R. 88, 89, 101, 364]. Oftentimes, persons who answered the magazine advertisements would thereafter receive said printed price lists [R. 20-23, 28-30]. This "mail order" enterprise soon accounted for a major portion of appellant's business [R. 403-406].

These brochures invariably stated that "Deposits may be refunded on orders which cannot be filled within 45

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[2]The abbreviation "R." refers to the "Reporter's Transcript of Proceedings" of the trial.

days" [see Govt. Ex. 2, R. 11], and the post card price lists usually contained the heading "IN STOCK FOR IMMEDIATE SHIPMENT" [see Govt. Ex. 11, R. 17]. Full or half remittance was required before shipment [see Govt. Exs. 2 and 68, R. 11 and 101]. The pets offered for sale were generally always the same, although some of them were scarce and seasonal [R. 182]; and the prices quoted were generally lower than market price at the time [R. 105-106, 192-193]. These factors acted as attractions to prospectve customers [R. 182, 191-192].

At the time that appellant was advertising his animals as "in stock for immediate shipment", he knew that they might not be in stock, or readily available for shipment, when orders were placed [R. 421, 427, 432, 433, 436, 454]. He also admittedly knew that he was hampered by a lack of operating capital and debts at the time he was promising refunds in his advertising [R. 420, 423]; and that these circumstances were forcing him to use remittances received on orders to pay his current bills, and to make refunds to prior dissatisfied customers who were pressing him [R. 252].

In response to appellant's magazine and direct mail advertising, each of the persons named in the indictment, and numerous others,[3] mailed a remittance to appellant in full payment of, or as a deposit upon, advertised pets. In each case the remittance was received and retained by the appellant. In some cases appellant acknowledged receipt of the order and the remittance, at times indicating that

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[3]Evidence of 25 customers was admitted into the record. In two of these cases orders were not placed until the appellant had expressly advised the parties, who had previously made specific inquiry, that animals desired were then in stock and available for immediate shipment [R. 109, 123, 124; Govt. Exs. 70, 74].

the shipment would be made immediately or in the near future [R. 22; Govt. Exs. 70 and 74]. In other cases the order and remittance went completely unanswered (see fn. 4 to App. Op. Br.). However, none of these orders was ever filled, nor, except in one case,[4] were any refunds made.[5] Attempts to obtain the ordered merchandise or a refund met with negative results. These attempts included letters, telephone calls, telegrams, and personal visits to the appellant [R. 13, 31, 44, 71]. In many cases appellant would not reply to any of these letters [R. 14-16, 31-36, 52]. In response to others, appellant would again promise to make shipment or tender refund, but would never do so, and would thereafter ignore further letters [R. 56, 64, 184-188]. The telephone calls, telegrams, and personal visits did not fare any better [R. 44, 71-73, 196-197].

The experiences of the following customers were typical:

> Mrs. Alva H. Coon of Tucson, Arizona, wrote to the appellant on three different occasions demanding a refund before receiving a reply approximately six months later. At that time appellant requested permission to still fill the order. Mrs. Coon responded that, athough she no longer had any use for the merchandise, she would cooperate and accept the ordered animals in lieu of a refund. Thereafter, not having received any merchandise or a reply to her last letter, the witness wrote to the appellant making a final demand for refund. She never received a reply thereto. [R. 23-27.]

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[4]Witness Cameron's remittance was refunded after personal demand at appellant's place of business and institution of legal action [R. 73].

[5]After indictment and during trial appellant apparently partially refunded monies to two witnesses [R. 425, 442].

Mark Champlin of Indianola, Iowa, wrote to appellant, in response to the latter's advertisement in "All Pets" magazine, stating that he immediately needed eight Rhesus monkeys, and that if appellant had them in stock he would place an order. Appellant replied by mail that this merchandise was in stock, whereupon the witness forwarded his order and a remittance of $200. Failing to receive his merchandise, the witness telephoned the appellant and was advised that the latter did not have the monkeys, and that an immediate refund would be made. The promise to refund not having been kept, the witness again telephoned the appellant, approximately two weeks later, only to be informed that the appellant did not have money with which to make a refund. Thereafter, over a period of approximately ten months, the witness wrote innumerable letters to the appellant about his refund without satisfactory results. Finally, in April of 1956, after a prior letter had not pacified the witness, the appellant wrote to Mr. Champlin offering the same monkeys for sale at a higher price! This offer was refused, and a refund was again demanded by letter and telephone without success. Another letter to the appellant in 1957 went unanswered. By the time of trial Mr. Champlin had heard nothing further from the appellant and had not recovered his $200. [R. 122-147.]

Mr. Daniel Smith of Monterey, California, ordered monkeys from the appellant after the latter had advised him by letter that the desired merchandise was then in stock. When nothing was received after a month, the witness wrote a letter of inquiry to the appellant and received a reply stating that a refund would be made if the order could not be shipped in a few days. Failing to receive the merchandise or a refund by the specified time, the witness telephoned

the appellant and was advised that his order would be filled by "the following Friday". When this did not materialize, another telephone call was placed to the appellant and a refund was demanded. None was ever received nor was the merchandise ever shipped. [R. 104-118.]

Contemporaneously with the foregoing events, appellant continued to advertise many of the very same animals as "in stock for immediate shipment"—oftentimes to the same individuals whose prior orders remained unfilled, and whose remittances had not been refunded [R. 16-17, 37, 47, 61, 62, 81, 118, 147, 189, 201]. During all of this period, appellant continued to operate his Los Angeles Pet Shop business, filling, when in stock, orders for local and direct over-the-counter customers, while orders for the same pets from prior out-of-town "mail order" customers went unfilled [R. 322, 323, 394, 458, 459]. The same policy was generally carried out with regard to refunds [R. 366, 370, 375].

Continual promises by the appellant to the postal authorities that he would fill the orders or make refunds were not kept [R. 264-267]. The same was true of promises to discontinue magazine advertisements and to stop direct mail advertising until appellant's affairs were in order [R. 252]. Eventually, the Postal Inspector was forced to conclude that appellant's apparent attitude of cooperation and sincerity was just an "act" [R. 278]. Thus, at a time when appellant was allegedly working in cooperation with the Postal Inspector, he laughingly told Witness Combs

that he was "scared" by Mr. Combs' advice that the witness would be forced to go to the postal authorities [R. 198, 201]. When Witness Cameron personally visited appellant at his place of business, during this same period, and demanded satisfaction, the following occurred:

> "I again demanded the birds which he had ordered or a refund and advised the defendant that if he didn't comply I would take the matter up with the authorities. The defendant then told me that there was nothing I could do; that I would merely be wasting my time and money to go to the authorities; and that if I was going to press him that way I would get nothing back. I then informed the defendant that I knew of other persons who had been taken by him and that it would not be too long before the postal authorities got around to him. The defendant replied that he didn't know what I was talking about, but that the only way I would get my money was for him to willingly give it to me." [R. 71-72.]

Appellant's attitude toward the entire affair is best expressed in his own words, which were contained in a letter written to witness Christiansen, as follows:

> "I promise you, when you have finished this letter, you will not think I am the biggest crook. I am really one of the smaller ones only." [Govt. Ex. 92, R. 184.]

After hearing the evidence and argument, the Court without the intervention of a jury, found the defendant to be guilty as charged, made special findings of fact, and entered a judgment of conviction.

## Statute Involved.

The indictment in the instant case was brought under Title 18, U. S. C., Section 1341, which in pertinent part provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

## ARGUMENT.

### I.

### The District Court Did Not Err in Denying Appellant's Motion to Subpoena Witnesses at the Government's Expense.

#### A. The Denial of Appellant's Said Motion Was a Proper Exercise of the Trial Court's Discretionary Powers.

During the time that the instant case was assigned for all proceedings to the docket of the Honorable Jacob Weinberger, United States District Judge, appellant moved the Court to subpoena defense witnesses at the Government's expense under the provisions of Rule 17(b) of the Federal Rules of Criminal Procedure [T. 18, *et seq.*]. In support thereof appellant filed affidavits and memoranda of law [T. 19-23, 29-35, 41-42]; and a counter-affidavit and memorandum of law in opposition to the motion was filed on behalf of appellee [T. 39-40, 27-28, 36-38]. At the hearing thereof, the only evidence submitted to the Court was the aforesaid affidavits of the appellant and the appellee. After stating to counsel that the burden of proof rested upon the appellant, the Court afforded appellant the opportunity to fortify his affidavit with oral testimony if he so desired [A. 32].[6] Through his counsel appellant repeatedly declined to accept this offer [A. 13, 15, 27], and offered in lieu thereof to allow the Court alone to question the appellant [A. 17].

After noting that its discretion was involved [A. 23], the Court indicated that it had reviewed the evidence before it, consisting of said affidavits and counter-affidavit bearing upon appellant's financial condition, and ruled that

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[6]The abbreviation "A" refers to the "Reporter's Transcript of Proceedings" held on June 5, 1958.

appellant did not establish to the Court's satisfaction his burden of showing entitlement to the benefits of said Rule 17(b) [A. 31-32].

Thus, the ruling of the Court was not predicated on the legal insufficiency, or lack thereof, of a particular affidavit, for the Court had before it not only the two affidavits submitted by the appellant but appellee's counter-affidavit as well.[7] Rather, the decision rendered was that, in the Court's opinion, after weighing all the evidence before it, appellant did not make a sufficient showing to the Court's satisfaction that he was a party within the Rule, and that in the exercise of the Court's discretion appellant's motion would be denied.

The United States Supreme Court and this Court have stated on innumerable occasions that the District Court has the discretionary right to deny a defense motion under Rule 17(b); and that the Court's exercise of that right is not subject to review on appeal, in the absence of an abuse of discretion. (*Crumpton v. United States,* 138 U. S. 361 (1891); *Goldsby v. United States,* 160 U. S. 70 (1895); *Dupuis v. United States,* 5 F. 2d 231 (9th Cir. 1925); *Austin v. United States,* 19 F. 2d 127 (9th Cir. 1927).) The applicability of this rule in mail fraud cases has also been recognized by the Courts. (*Reistroffer v. United States,* 258 F. 2d 379 (8th Cir. 1958); *Estep v. United States,* 251 F. 2d 579 (5th Cir. 1958).)

Appellant does not show wherein the Court below abused its discretion in denying his motion, and, in fact, he admits that no abuse was committed (App. Op. Br. p. 13). He, therefore, has no legal cause for complaint.

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[7]In making its ruling the Court expressly referred to the information pertaining to appellant's financial condition which appellee had set forth in its counter-affidavit [A. 31-32].

However, appellant does complain, arguing, in effect, that where a defendant makes an affidavit, stating in conclusionary language that he is an indigent within the meaning of Rule 17(b), the trial court, in exercising its discretion, is bound thereby and cannot inquire further. Admittedly, the trial court did not take such a limited view of its discretionary powers, and indicated that to satisfy the court, appellant would have to adduce facts showing indigency under the Rule, rather than merely state conclusions [A. 12, 14, 16].

The broad view of its discretionary powers taken by the court herein was set forth in *United States v. Kinzer,* 98 Fed. Supp. 6, 8 (D. D. C. 1951) as follows:

> "No one will deny that every reasonable effort should be made to insure a fair trial to the defendant in any criminal case, even at the expense of the government in the case of an indigent defendant. However, it is equally evident that in permitting indigent defendants to proceed in forma pauperis under the provisions of 28 U. S. C. §1915, the courts must protect the public from having to pay unnecessarily heavy costs on behalf of such defendants, and in the exercise of their discretion should refuse to authorize expenditures unless there is a showing of merit and necessity in the defendant's application. Adkins v. E. I. DuPont De Nemours & Co., 335 U. S. 331, 337, 69 S. Ct. 85, 93 L. Ed. 43."

A recent Eighth Circuit mail fraud case stated the applicable rule as follows:

> "It is well settled that Rule 17(b), Federal Rules of Criminal Procedure, 18 U. S. C. A., under which the motion for subpoena was made, does not accord the indigent defendant an absolute right to subpoena witnesses at government expense. There is and must

be wide discretion vested in the District Court to prevent the abuses often attempted by defendants."

*Reistroffer v. United States,* 258 F. 2d 379, 396 (8th Cir. 1958).

Thus, even where a defendant submits an affidavit setting forth the information required by Rule 17(b), the trial court's denial of the motion, in the absence of an abuse of discretion, is final. (*Goldsby v. United States, supra; Estep v. United States, supra; Reistroffer v. United States, supra.*)

To adhere to the position urged herein by appellant would not only stringently limit the discretionary powers of the trial court, but would also obviate the necessity for any hearing of the motion on notice. On this point, Circuit Judge Hutcheson in *Thomas v. United States,* 168 F. 2d 707 (5th Cir. 1948) commenting as follows, on page 709:

"Federal Rules of Criminal Procedure, rule 17(b), 18 U. S. C. A. following section 687, under which the motion was made, does not provide for secrecy with respect to the motion and, if witnesses are to be subpoenaed at the expense of the government, it certainly would be proper that counsel for the government be advised of the motion and heard by the court in respect to it."

The case of *Adkins v. E. I. Dupont de Nemours & Co.,* 335 U. S. 331, 93 L. Ed. 43 (1948), cited by the appellant, is not contrary to the foregoing. In that case, the court merely pointed out that an affidavit drawn in the statutory language should "ordinarily be accepted . . .

particularly where unquestioned. . . ." In the case at bar, the contents of appellant's affidavit were questioned by appellee's counter-affidavit and, in reviewing the evidence before it, as contained in said affidavits, the Court resolved the motion in appellee's favor. This the Court had the discretionary right to do.

**B. The Action of the District Court in Denying Appellant's Said Motion Did Not Affect Appellant's Substantial Rights.**

At the trial of this case, the appellee stipulated to the testimony of each of the very witnesses which appellant had unsuccessfully sought to have subpoenaed under Rule 17(b). Thus, although the trial court properly denied appellant's attempt to have these witnesses subpoenaed, appellant was not, in the last analysis, deprived of the benefit of their evidence.

Yet, appellant contends that the court's denial of his motion violated his substantial rights by "forcing" him to obtain the testimony of his witnesses by stipulations which he now claims were unfavorable.

In *Iva Ikuko Toguri D'Aquino v. United States,* 192 F. 2d 338 (9th Cir. 1951), and in *Bistram v. United States,* 248 F. 2d 343 (8th Cir. 1957), after defense motions to subpoena certain witnesses under Rule 17(b) were denied, the testimony of said witnesses was obtained by deposition. In each case, the judgment of conviction was affirmed, this Court stating in the *D'Aquino* case at page 376:

> "In any event, the question of payment by the United States of fees and expenses of defense witnesses is one within the sound judicial discretion of

the trial court. Meeks v. United States, 9 Cir., 179 F. 2d 319; Dupuis v. United States, 9 Cir., 5 F. 2d 231 Cf. Goldsby v. United States, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343. We find no reversible error in the action of the trial court here referred to."

Furthermore, the record itself shows the invalidity of the argument made by appellant. When appellant made his motion under Rule 17(b), the defense witnesses he requested therein had not been interviewed by him regarding their expected testimony, but their names had been selected at random from appellant's records [R. 488]. As soon as notice of the motion was served upon appellee, the Government caused each of these witnesses to be interviewed, and immediately made their full expected testimony available to appellant's counsel [A. 24]. Prior to the hearing of appellant's motion, his counsel was apprised of the testimony of numerous Government witnesses, and a stipulation of the testimony of both prosecution and defense witnesses was discussed and agreed upon, only to be finally rejected by appellant's counsel [A. 25]. Thereafter, the hearing on the motion was held, and the stipulations which were introduced into evidence at the trial were agreed upon. These stipulations contained the same material content as the prior abortive stipulations [R. 488].

Accordingly, it is submitted that appellant has in no way sustained his burden of showing that he was deprived of any substantial rights by the adverse ruling of the District Court on his motion under Rule 17(b). Rather, he has demonstrated that, through appellee's cooperation, he was able to present defense evidence which otherwise might not have been legally available to him.

## II.

## The Judgment of Conviction Was Supported by Substantial Evidence and Therefore Should Be Affirmed.

Appellant next contends, in effect, that there was insufficient evidence to support the trial court's finding of fact that he devised and intended to devise a scheme to defraud.

In *Woodard Laboratories v. United States,* 198 F. 2d 995, 998-999 (9th Cir. 1952), this Court enunciated the cardinal rule governing appellate reviews where such a contention is made, as follows:

> "* * * The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U. S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680. See Banks v. United States, 9 Cir., 1945, 147 F. 2d 628.
>
> "* * * Substantial evidence is '* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *.' N. L. R. B. v. Columbian Co., 1939, 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660."

The Sixth Circuit in *Battjes v. United States,* 172 F. 2d 1, 5 (6th Cir. 1949), thusly stated the rule:

> "* * * This Court in reviewing a judgment for the purpose of determining whether the evidence was sufficient to support the conviction must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom, most favorable to the

> government, and determine therefrom whether the finding was supported by substantial and competent evidence, and where there is substantial and competent evidence, which if believed, supports the conviction, the appellate court can not weigh the evidence or determine the credibility of witnesses. Zottarelli v. United States, 6 Cir., 20 F. 2d 795; Meyers v. United states, 6 Cir., 94 F. 2d 433; United States v. Manton, 2 Cir., 107 F. 2d 834, 839; Murray v. United States, 8 Cir., 117 F. 2d 40, 44."

It is to be noted that each of the foregoing cases was tried by the trial court sitting without the intervention of a jury.

In making this determination, the appellate court cannot retry the facts. As was stated in *Stoppelli v. United States,* 183 F. 2d 391 (9th Cir. 1950), *cert. den.* 71 S. Ct. 88, at page 393:

> "* * * It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. Curley v. U. S., 81 U. S. App. D. C. 229, 160 F. 2d 229, 230."

In accord:

*Remmer v. United States,* 205 F. 2d 277 (9th Cir. 1953);

*Charles v. United States,* 215 F. 2d 831 (9th Cir. 1954);

*Elwert v. United States,* 231 F. 2d 928 (9th Cir. 1956).

Admittedly, the appellee relies upon circumstantial evidence to sustain the trial court's finding that appellant had the requisite intent. Regarding offenses of the instant nature, this Court has stated in *Marshall v. United States,* 146 F. 2d 618, 620 (9th Cir. 1944):

> "* * * Direct evidence is rarely available to prove a fraudulent scheme or fraudulent intent. From the very nature of the offense, it must be inferred from the facts and circumstances of the situation in question. Clarke v. United States, 9 Cir., 1942, 132 F. 2d 538, 541; Gates v. United States, 10 Cir., 1941, 122 F. 2d 571, 575.
>
> "* * * Direct proof of willful intent is not necessary. It may be inferred from the acts of the parties, and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. It is a question of fact to be determined from all the circumstances. (Cases cited.)"
>
> *Battjes v. United States, supra,* at p. 5.

Also see:

> *Schauble v. United States,* 40 F. 2d 363 (8th Cir. 1930).

In resolving this question of fact, the trier thereof is required to weigh the actions and conduct of the defendant against his statements professing innocence. (*United States v. Freeman,* 167 F. 2d 786 (7th Cir. 1948).) In short, actions may speak louder than words. The trier may conclude that the defendant "is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third." (*Elwert v. United States, supra,* at p. 934.) Thus, in arriving at its findings the trial court, when it is the trier of the facts, must of necessity pass upon the credibility of the accused, and its deter-

mination in that regard is not a matter for review. (*Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (9th Cir. 1948); *United States v. White,* 228 F. 2d 832 (7th Cir. 1956).)

It therefore follows that a conviction may be predicated upon circumstantial evidence, even though there is direct testimony in the record of professed innocence. This was recognized in *Penosi v. United States,* 206 F. 2d 529 (9th Cir. 1953), wherein it was contended, as does appellant here, that when a conviction is based upon circumstantial evidence, the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. After noting that this precept in many cases serves no other purpose than to confuse juries, the Court stated at pages 530-531:

> "* * * If the evidence is sufficient to convince beyond a reasonable doubt that the charge is true it is immaterial whether it be circumstantial or direct. Guilt can be satisfactorily established from 'a "development and a collocation of circumstances."' Glasser v. United States, 315 U. S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680."

Also see:

*Charles v. United States, supra.*

Were the rule otherwise, it is apparent that a defendant's mere denial of a guilty intent would alone be sufficient to require acquittal.

In light of the foregoing applicable principles, the question herein posed to this Court may be stated as follows: Whether, taking a view most favorable to the appellee, there is substantial evidence in the record, be that evidence circumstantial or direct, from which a trier of the facts

could reasonably conclude that appellant was guilty as charged beyond a reasonable doubt.

It is submitted that the facts present in the record of this case, as heretofore set forth, do show such substantial evidence. They present a clear and consistent pattern, as found by the District Court [R. 521], of the operation of a wide-scale fraudulent mail order business within the framework of a basically legitimate local pet shop enterprise. Such an activity is clearly within the purview of the mail fraud statute. (*Stephens v. United States,* 41 F. 2d 440 (9th Cir. 1930), *cert. den.* 282 U. S. 880.)

Thus, while satisfying the demands of local on-the-scene customers, appellant operated differently when it came to dealing with his out-of-town mail order clients. With reference to said clients, as appellant admits, he would take orders for merchandise, and neither ship nor make refunds. But, contrary to appellant's contentions, the Government's evidence was not confined to these indicia of fraudulent intent. The above actions were only the results of the devised scheme. The full pattern was more extensive. It included, among other things, advertising pets for sale at deflated prices with a promise of speedy shipment or refund, at a time when appellant knew he was in no position to perform either; cashing remittances on orders, but never shipping the animals or making refunds; in the meantime, filling later local orders on the same pets; continually lulling customers with promises of future shipment or refund, which were never intended to be kept, but which served to temporarily pacify; attempting to also pacify the postal authorities with similar false promises; and attempting to advertise the same animals, making the same representations, at a time when appellant had promised the postal authorities to discontinue this practice, and

at a time when he was still advising unsatisfied customers that he could not make a shipment or refund.

These were factors to which the trial court could, and did, attach significant weight.

Appellant, of course, testified at length that he at no time had an intent to defraud, and offered explanations for his defalcations [R. 406-445]. Basically he stated, and contends here, that a major source of his animal supply was cut off by an airplane embargo, and that due to financial straits he did not have money available for refund [R. 419-423, 431].

Appellant now urges this Court to reverse his conviction on the grounds that his testimony was uncontroverted. However, the record shows otherwise. The evidence introduced by appellee proved that appellant's aforesaid pattern of fraudulent operation was initiated and was being carried on well in advance of the time that the embargo relied upon went into effect [R. 463-468]; and that said embargo did not apply to cargo service [R. 355], nor to all of the animals which appellant fraudulently failed to ship to customers [R. 447-450]. Regarding his professed inability to make refunds, appellant's own evidence demonstrated that his gross dollar-volume of business for 1955, 1956, and the first two months of 1957, was $39,626.87, $31,078.37, and $4,102.96, respectively [R. 402, 404-405]. It is submitted that appellant can not on the one hand contend, as he does (App. Op. Br. pp. 39, 58), that his business operation was sufficiently successful so that he did not need to defraud individuals for small amounts; and on the other hand maintain that he was financially unable to make refunds. Obviously, these positions are mutually inconsistent—for if appellant's business was successful he cannot plead lack of funds as his excuse for not making re-

funds; and if he lacked funds, the fraudulent obtaining of money, in small amounts at a time, from distantly located individuals was a means of getting the needed funds without great fear of retaliatory action. Furthermore, if appellant was in financial straits, as claimed, he knew that he could not make refunds all during the time that he was continually representing refunds would be made.

Having heard appellant's testimony and his explanations, the trial court, as trier of the facts, had the right to disbelieve his protestations of innocence in the light of the other evidence present in the record. In holding for appellee the trial court so acted, and it is submitted that there was substantial evidence in the record to sustain the Court's determination that appellant was guilty as charged beyond a reasonable doubt.

## Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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